STATE OF MICHIGAN

COURT OF APPEALS

CRAIG C. SMITH, CONNIE SMITH, JAMES NIEMI, and LAURA NIEMI,

Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants,

v

LIVINGSTON COUNTY DRAIN COMMISSION, GENEVIEVE JAKUBUS, MAUREEN JAKUBUS, PERI GAGALIS, PATTY JO GAGALIS, HARRY COLLINS, VIRJENE DOHERTY, LORAINE HARWICK, GERALD RICHARDS, KAREN RICHARDS, JACK I. COLEMAN, CREAGH MILFORD, KATHLEEN MILFORD, RICHARD HAAS, WILLIAM PEET, SHARON PEET, MICHAEL MCGUIRE, TRESSA MCGUIRE, HAROLD A. HARTMAN, SHARON K. HARTMAN, NELSON BAUDER, BERNARD C. SHEEHAN, and RONALD C. BELL,

Defendants,

and

LIVINGSTON COUNTY ROAD COMMISSION, PUTNAM TOWNSHIP, and TREASURER OF MICHIGAN,

Defendants-Appellees,

and

PAUL KING, SANDRA M. KING, JAMES FETT, MARGARET A. FETT, and JANET HAMLIN-O'BRIEN,

Defendants/Counter-Plaintiffs,

UNPUBLISHED
May 5, 2005

No. 251523
Livingston Circuit Court
LC No. 00-018130-CH

and

JOAN F. PARKS and MAUVIZ MARY SHEEHAN,

Defendants/Counter-Plaintiffs-Cross-Appellees,

and

LEO K. LUCKHARDT and LORENA K. LUCKHARDT,

Defendants-Cross-Appellees,

and

MICHAEL GRZESIK and CAROL GRZESIK,

Defendants/Counter-Plaintiffs-Appellants/Cross-Appellees.

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

In this action to vacate an alley in a platted subdivision on Portage Lake, defendants Michael Grzesik and Carol Grzesik appeal as of right from an order of the trial court denying their motion for summary disposition and instead, pursuant to MCR 2.116(I)(2), granting summary disposition in favor of plaintiffs Craig Smith, Connie Smith, James Niemi and Laura Niemi; thereby excluding the Grzesiks and all other members of the public that did not own property in the subdivision from accessing Portage Lake by means of the alley that plaintiffs sought to vacate. On cross-appeal, plaintiffs challenge orders of the trial court declaring that the alley was owned by no one, permitting the construction and maintenance of a dock for the benefit of plat subdivision lot owners, and restricting plaintiffs' use of the alley. Because we conclude that questions of fact exist regarding whether plaintiffs withdrew the plattors' offer of public dedication before acceptance pursuant to MCL 560.255b, but that the trial court was correct in ruling that the construction and maintenance of a dock at the end of Alley No. 5 is permissible, we affirm in part, reverse in part, and remand.

Facts and Procedural History

On October 29, 1908, the plattors, Clarence and Sarah Baughn, approved the Baughn Bluff subdivision plat. The plat contained an alley, designated as Alley No. 5, that is located adjacent to Lot No. 53, which is now owned by plaintiffs. The alley runs from a neighborhood

street to the shore of Portage Lake. The parties do not dispute that all streets and alleys in the plat were dedicated by the plattors for public use.

Plaintiffs initiated this action to vacate Alley No. 5 pursuant to the Land Division Act, MCL 560.101 *et seq*. Plaintiffs claimed that, although Alley No. 5 was dedicated to the public, there had been no acceptance by any public authority. Plaintiffs therefore requested that the alley be vacated and that title to one-half of the alley be vested in plaintiffs, and the other half in the owners of the lot on the opposite side of the alley. Plaintiffs also requested that the trial court enjoin the construction and maintenance of a private dock at the end of the alley, claiming that the dedication of Alley No. 5 did not include the right for a private person to construct a dock at the end of the alley.

Although this case has an extensive procedural history, we find the following events relevant for purposes of our review. First, in granting a motion for partial summary disposition early on in the case, the trial court held that regardless whether the dedication of Alley No. 5 had ever been accepted or withdrawn, subdivision lot owners in the plat had a right to use the alley for access to the lake.[1]

Next, at the close of discovery, the Grzesiks, who are not subdivision lot owners, but have used Alley No. 5 for lake access, filed a motion for summary disposition requesting that the trial court declare Alley No. 5 a public alley. In doing so, the Grzesiks argued that under MCL 560.255b, public acceptance of the alley was presumed and that plaintiffs failed to demonstrate that the offer to dedicate was withdrawn before MCL 560.255b was enacted in 1978. In response, plaintiffs argued that they and their predecessors had withdrawn the offer to dedicate when, in approximately 1945, plaintiffs' predecessor constructed a cottage that encroached on the alley by six inches, and a pump house that encroached approximately three feet into the alley. Plaintiffs also presented evidence that their predecessors had filled the alley with dirt to make it usable and that they and their predecessors had done numerous other acts through the years that supported a finding that acceptance was withdrawn. Included within these acts were use of the alley to park plaintiffs' cars and recreational equipment, mowing and landscaping of the alley, installation of a satellite dish, clothesline, stairs, downspouts, garden, and septic system within the alley, in addition to general recreational use of the alley in a manner consistent with private ownership. Plaintiffs also acknowledged, however, that neither they nor their predecessors ever acted to prevent any other persons from using the alley.

The trial court denied the Grzesiks' motion and granted summary disposition in favor of plaintiffs under MCR 2.116(I)(2), finding that the Grzesiks had failed to show public acceptance of the offer, either formally or informally. The Grzesiks filed a motion for reconsideration,

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[1] Plaintiffs do not appeal this ruling, and rightfully so. As observed by this Court in *Nelson v Roscommon Co Rd Comm*, 117 Mich App 125, 132-133; 323 NW2d 621 (1982), relied on by the court below, it is well-established that deeds conveying title to lands that have been platted entitle the owner to use of the streets and ways laid down in the plat, regardless of whether there has been a dedication and acceptance of such ways by the public, or whether such ways are subsequently abandoned by the public or vacated.

claiming that in granting summary disposition to plaintiffs the trial court failed to acknowledge that public acceptance was presumed by MCL 560.255b. The trial court thereafter issued an order and judgment which held, without elaboration, that Alley No. 5 "was not accepted by the public before the offer to dedicate was withdrawn." Further, in the order and judgment the trial court vacated only the portions of the alley where plaintiffs' cottage and pump house encroached onto Alley No. 5, but made no determination of ownership of Alley No. 5 other than the easement interest awarded earlier that allowed lake access by subdivision lot owners. The court also enjoined all users of the alley from engaging in any acts that might interfere with access to the lake and ruled that the subdivision lot owners had the right to construct and maintain a dock at the end of Alley No. 5 to facilitate access to the lake. This appeal followed.

Public Dedication

The Grzesiks argue that the trial court erred in failing to apply the presumption of public acceptance under MCL 560.255b and in finding that plaintiffs had established that the offer to dedicate had been withdrawn.

We review de novo the grant or denial of a motion for summary disposition. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001). "Generally, a valid statutory dedication of land for a public purpose requires two elements: (1) a recorded plat designating the areas for public use; and (2) acceptance by the proper public authority." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 113; 662 NW2d 387 (2003). "'[A]cceptance of dedicated parcels may be (1) formal by resolution; (2) informal through the expenditure of public money for repair, improvement and control of the roadway; or (3) informal through public use.'" *Marx v Dep't of Commerce*, 220 Mich App 66, 77; 558 NW2d 460 (1996), quoting *Eyde Bros Dev Co v Roscommon Co Bd of Rd Comm'rs*, 161 Mich App 654, 664; 411 NW2d 814 (1987).[2] As long as the plat proprietor or his successors took no steps to withdraw the offer to dedicate, the offer is treated as continuing. *Vivian v Roscommon Co Bd of Rd Comm'rs*, 433 Mich 511, 519-520; 446 NW2d 161 (1989).

Acceptance may also be presumed by operation of MCL 560.255b, which provides:

[2] The Grzesiks also argue that public acceptance occurred informally, through township involvement with, or public use of, the alley. However, we find the township supervisor's notation regarding use of the streets and alleys in the 1941 Supervisor's Plat of Beulah Beach, which redrew a portion of the Baughn Bluff plat and on which the Grzesiks rely, to be clearly insufficient to establish acceptance, see *Marx*, *supra*, and note that all other township involvement with the alley cited by the Grzesiks occurred after the presumed acceptance in 1978 pursuant to MCL 560.255b. Moreover, as found by the trial court, "the supermajority of persons that have used the alley were either lot owners inside the plat, lot owners outside the plat that believed they were located within the plat or invited individuals of lot owners." Such use is similarly insufficient to establish informal acceptance by public use. See *Smith v Auditor General*, 380 Mich 94, 99; 155 NW2d 822 (1968).

> (1) Ten years after the date the plat is first recorded, land dedicated to the use of the public in or upon the plat shall be presumed to have been accepted on behalf of the public by the municipality within whose boundaries the land lies.
>
> (2) The presumption prescribed in subsection (1) shall be conclusive of an acceptance of dedication unless rebutted by competent evidence before the circuit court in which the land is located, establishing either of the following:
>
> (a) That the dedication, before the effective date of this act and before acceptance, was withdrawn by the plat proprietor.
>
> (b) That notice of the withdrawal of the dedication is recorded by the plat proprietor with the office of the register of deeds for the county in which the land is located and a copy of the notice was forwarded to the state treasurer, within 10 years after the date the plat of the land was first recorded and before acceptance of the dedicated lands.

We recently applied this presumption in *Higgins Lake*, *supra* at 116, and found that, when the statutory presumption applies, the burden shifts to the party seeking to vacate the plat to show that the offer was withdrawn. "Offers are deemed withdrawn when the proprietors use the property in a way that is inconsistent with public ownership." *Kraus v Dep't of Commerce*, 451 Mich 420, 431; 547 NW2d 870 (1996). "What qualifies as inconsistent use will depend on the circumstances of each case, and acquiescence by one of the parties to the other party's use of the property will often be pivotal." *Id*.

In its order and judgment after the filing of the motion for reconsideration, the trial court does not address the presumption of acceptance occurring on the effective date in 1978 of MCL 560.225b. Rather, the trial court merely states that the offer of dedication was withdrawn before public acceptance. We presume that the trial court was relying on MCL 560.255b in its reference to acceptance and thus no error is present regarding whether the statute applied. Thus, the issue is whether the offer of the plattors was withdrawn before 1978 by the private acts of plaintiffs and their predecessors. From our review of the record, we conclude that whether the offer was withdrawn is a disputed fact question that requires resolution at trial rather than by summary disposition. As previously noted, while there is evidence that plaintiff's acquiesced in use of the alley by others, plaintiffs have presented evidence of a number of acts arguably "inconsistent with public ownership." *Krause*, *supra* at 431. Consequently, we reverse and remand for trial on the question of withdrawal only.

Issues on Cross-Appeal

On cross-appeal, plaintiffs raise three issues concerning the orders entered by the trial court regarding the ownership and use of Alley No. 5. If after trial on remand the finding is that the offer of dedication was withdrawn, the issues in the cross-appeal will remain. Also, two of these issues have applicability even if the finding at trial is that the offer of dedication was not withdrawn. Consequently, we address these issues in the interest of judicial economy.

Plaintiffs' first issue on cross-appeal is that the trial court erred in vacating only that portion of Alley No. 5 on which plaintiffs' cottage, pump house and docks encroach, leaving the

remainder as land not possessed by anyone and subject only to the subdivision lot owners' easement. We agree. This Court reviews equitable actions de novo and the trial court's findings of fact are reviewed for clear error. *Slatterly v Madiol*, 257 Mich App 242, 248-249; 668 NW2d 154 (2003).

In its final ruling from the bench, the trial court held:

> Because of the fact that a permanent easement exists in favor of all the lot owners in the plat, the history of troubled neighborly relations involving this property and the possible misguided belief on the part of the plaintiff that vacation possession of the parcel will allow them to use the land in a way that is possibly going to interfere with other lot owners rights[,] the Court chooses not to vacate alley number five except that portion of alley number five upon which the plaintiff's structure encroaches shall vest in the plaintiff so they may have a clear marketable title. The remainder of alley number five is vested in no one and shall exist for the benefit of all lot owners within the plat for ingress and egress to the lake.

However, title to real property must vest in someone. See *In re Estate of Matt Miller*, 274 Mich 190, 193; 264 NW 338 (1936). Indeed, if no one holds title to Alley No. 5, then no one is responsible for its upkeep and maintenance. Consequently, we conclude that if at trial the decision is that the dedication for public use was withdrawn before acceptance, the trial court must divide ownership between the adjoining property owners of Lots 52 and 53, subject to the easement of the subdivision lot owners.

Next, plaintiffs cross-appeal the trial court's finding that a dock at the end of Alley No. 5 was within the scope of the dedication. We affirm that finding, but with a modification. Further, we observe that resolution of this issue is essentially the same regardless of whether access to Alley No. 5 is found to be permissible for the public generally or for subdivision lot owners only.

Paragraph 11 of the trial court's order of September 19, 2003, provides:

> Residents of Baughn Bluff and Beulah Beach may erect a reasonable dock in Alley No. 5 for the use of all of the residents of Baughn Bluff and Beulah Beach, so long as the dock does not interfere with the rights of any of the residents of Baughn Bluff and Beulah Beach. The dock may not be used for the permanent mooring of boats.

We summarized the law on this issue in *Higgins Lake*, *supra* at 99:

> "Publicly dedicated streets that terminate at the edge of navigable waters are generally deemed to provide public access to the water. *Thies v Howland*, 424 Mich 282, 295; 380 NW2d 463 (1985); *McCardel v Smolen*, 404 Mich 89, 96; 273 NW2d 3 (1978); *Backus v Detroit*, 49 Mich 110; 13 NW 380 (1882). The members of the public who are entitled to access to navigable waters have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing, and swimming. An incident of the public's right of navigation is the right to anchor boats temporarily. *Thies*, *supra* at 288. The right of a

> municipality to build a wharf or dock at the end of a street terminating at the edge of navigable waters is based upon the presumption that the platter intended to give access to the water and permit the building of structures to aid in that access. *Thies*, *supra* at 296. The extent to which the right of public access includes the right to erect a dock or boat hoists or the right to sunbathe and lounge at the road end depends on the scope of the dedication. *McCardel*, *supra* at 97; *Thom v Rasmussen*, 136 Mich App 608, 612; 358 NW2d 569 (1984). The intent of the dedicator is to be determined from the language used in the dedication and the surrounding circumstances. *Thies*, *supra* at 293; *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928)." [quoting *Jacobs v Lyon Twp (After Remand)*, 199 Mich App 667, 671-672; 502 NW2d 382 (1993).]

Plaintiffs argue that the only historical evidence presented was that private boat docks had been installed for short periods in the recent past, and that the docks had been removed because of objections from other lot owners. Plaintiffs thus conclude that because there was no evidence of the long-term presence of a dock, the trial court erred in finding that a dock at the end of the alley was within the scope of the dedication.

However, we rejected the argument that evidence of recent historical uses was relevant to the determination of the scope of a dedication in *Higgins Lake*: "in the absence of evidence that the historical uses of the road ends were contemporaneous with the dedication, the road-end activity occurring *after* the dedication are not helpful in determining the dedicators' intent." *Higgins Lake*, *supra* at 103. In the instant case, the parties have presented no evidence regarding the uses of Alley No. 5 at the time of its dedication. Thus, the trial court was left with the presumption from *Theis*, *supra* at 296, that "the plattor intended to give access to the water and permit the building of structures to aid in that access."

We note, however, that where such access is given to the public generally, it is the governmental entity that has been deemed to have accepted the dedication which, "on behalf of its citizens, is entitled to build [a dock] at the end of [the alley] to aid the public's access." *Id*. at 295-296. Private docks are not permissible. *Higgins Lake*, *supra* at 104. Thus, although in such situations the public may use the access point made available by the dedication to make use of the surface of the water in such reasonable manners as boating, fishing, swimming, and the temporary mooring of boats, the Grzesiks and other members of the public, including lot owners of this subdivision, are not themselves entitled to erect docks for private use. *Thies*, *supra* at 288; *Higgins Lake*, *supra* at 103-104. That right is reserved to the governmental entity found to have accepted the dedication, if the finding is at trial that there was no withdrawal of the plattors' dedication, or alternatively, the Baughn Bluff and Beulah Beach plat subdivision lot owners generally, if withdrawal occurred, and in either event is limited to "one, nonexclusive dock" to aid access to the water. *Higgins Lake*, *supra* at 104. No individual or group of individuals, whether members of the general public or subdivision lot owners, may install a dock. That right and its attendant obligations falls to either the governmental entity that has accepted the dedication of Alley No. 5, or the subdivision lot owners as a whole.

Finally, plaintiffs argue that the trial court erred in granting a temporary and permanent injunction enjoining all users from engaging in activities on Alley No. 5 that might interfere with access to Portage Lake. We disagree.

We review a trial court's grant of injunctive relief for an abuse of discretion. *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). The "'granting of injunctive relief is within the sound discretion of the trial court, although the decision must not be arbitrary and must be based on the facts of the particular case.'" *Id*., quoting *Holly Twp v Dep't of Natural Resources*, 440 Mich 891; 487 NW2d 753 (1992).

Injunctive relief is an extraordinary remedy that courts normally grant only when "(1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury." *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 400; 516 NW2d 498 (1994). The factors to be considered in determining whether an injunction should issue include:

> "(a) the nature of the interest to be protected,
>
> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
>
> (c) any unreasonable delay by the plaintiff in bringing suit,
>
> (d) any related misconduct on the part of the plaintiff,
>
> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
>
> (f) the interests of third persons and of the public, and
>
> (g) the practicability of framing and enforcing the order or judgment." [*Higgins Lake, supra* at 106, quoting *Kernen v Homestead Dev Co*, 232 Mich App 503, 514-515; 591 NW2d 369 (1998).]

On September 9, 2002, the trial court entered a temporary injunction that enjoined plaintiffs from engaging in certain activities on Alley No. 5, specifically leashing dogs, erecting tents, or placing structures in the alley. The temporary injunction also enjoined all parties from parking vehicles in the alley, except incident to putting in or taking out a boat. On April 30, 2003, the court entered a permanent injunction that enjoined all users of Alley No. 5 from engaging in any activities "inconsistent with the rights attached to Alley No. 5."

Plaintiffs challenge both the temporary and permanent injunctions. However, where a temporary injunction is followed by a permanent injunction addressing the same subject matter, a "challenge to the earlier preliminary injunction is moot and need not be addressed." *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich App 647, 656; 588 NW2d 133 (1998).

The motions for injunctive relief cited various acts on the part of plaintiffs in attempts to assert their rights to Alley No. 5 before the issues were resolved by the court. Among the acts alleged was that plaintiffs and the other adjoining lot owners had placed two docks that encroached on the lake in front of the alley, so that other lot owners were unable to use the alley to launch their boats. Given the escalating interference by plaintiffs, in violation of the

temporary injunction and the grant of partial summary disposition, we cannot say that it was an abuse of discretion for the court to issue a permanent injunction prohibiting interference with the alley. Rather, given the nature of the interests adverse to plaintiffs and the potential for hardship if the permanent injunction was not granted, as well as the lack of an apparent practical alternative to such an injunction, the trial court reasonably granted this injunctive relief. Furthermore, contrary to plaintiffs' assertion, the injunction does not limit their rights any more than those of the other users, as it enjoins "[a]ll persons." Accordingly, plaintiffs' claim that the injunction was erroneously granted or that it deprived plaintiffs of certain rights in favor of other users is without merit.

We affirm in part, reverse in part, and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Bill Schuette